IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 7TH SEPTEMBER 2007 / 16TH BHADRA 1929

SA.No. 619 of 1994(F)

AS.193/1992 of DISTRICT COURT, THRISSUR
OS.407/1990 of MUNSIFF COURT,WADAKKANCHERRY
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PLAINTIFF:RESPONDENT/APPELLANT

CHANDRAN, AGED 42 YEARS
S/O.ACHINGARE PADU, KALLAMPARA DESOM
THEKKUMKARA VILLAGE, TALAPPILLY TALUK.

BY ADV. SRI.K.P.SREEKUMAR

DEFENDANT/APPELLANT/RESPONDENT

SIMON, AGED 32 YEARS,
S/O.PANENGADAN KUNHIPORINCHU
KUMBALANGAD DESOM, WADAKKANCHERRY VILLAGE
TALAPPILLY TALUK.

BY ADV.SRI.KRISHNA PRASAD
D. NARENDRANATH &
JOJI VARGHESE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 7 /9 /2007 THE COURT ON 07/09/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.619 OF 1994

Dated, this the 7th day of September, 2007

JUDGMENT

Plaintiff in O.S.407/1990 on the file of Munsiff Court, Wadakkancherry is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for realisation of Rs.15,000/- due under Ext.A1 promissory note. It was contended that respondent borrowed Rs.15,000/- on 3.10.1989 and executed Ext.A1 promissory note promising to repay the same on demand and subsequently Rs.5000/- was repaid as per cheque dated 19.4.1990 and inspite of notice balance was not paid and therefore appellant is entitled to the decree. Respondent resisted suit contending that he did not execute the promissory note and did not borrow Rs.15,000/- as alleged. It was contended that appellant and respondent were

working as shop managers under an Abkari contractor and when respondent wanted a transfer from one branch to another, he approached appellant who demanded Rs.5000/- for arranging the transfer and for that purpose a cheque was obtained from respondent along with signed blank papers and signed stamp papers and respondent is not liable to pay the amount claimed.

2. Learned Munsiff on evidence of PWs. 1 and 2 and DW1 and Exts.A1 to A5 granted a decree holding that respondent borrowed Rs.15,000/- and executed as Ext.A1 promissory note and repaid Rs.5000/- evidenced by Ext.A2 and the balance is due. Respondent challenged the decree and judgment before District Court, Thrissur in A.S.193/1992. Learned District Judge on reappreciation of evidence set aside the decree and dismissed suit holding that Ext.A1 is a concocted document and respondent did not execute the promissory note or borrowed the amount as claimed by appellant. It is challenged in the

appeal.

3. Appeal was admitted formulating the following substantial questions of law.

1. Whether first appellate court was right in not applying the presumption under section 118 of N.I. Act as respondent admitted his signature in Ext.A1.

2. Whether on evidence first appellate court was justified in holding that respondent did not borrow Rs.15,000/- or execute Ext.A1 promissory note, when respondent did not establish the defence case.

4. Learned counsel appearing for appellant was heard.

5. The argument of learned counsel appearing for appellant is that the reasons given by first appellate court to reverse the finding of trial court are unsustainable. Learned counsel argued that respondent admitted his signature in Exts.A1 and A2 and did not establish that he had handedover signed blank paper or stamp paper to

the appellant for the purpose of a transfer as alleged and in such circumstance first appellate court was not justified in disbelieving the evidence of appellant or reversing the decree of trial court.

6. The trial court accepted the evidence of PWs.1 and 2 and disbelieved evidence of respondent as DW1 and found that respondent borrowed Rs.15,000/- and executed Ext.A1 promissory note and repaid Rs.5000/- as evidenced by Ext.A2. Learned District Judge on reappreciation of evidence found that Ext.A2 is not genuine as the factum of execution of Ext.A2 or payment of Rs.5000/- towards consideration of Ext.A1 were not mentioned in Ext.A3 lawyer notice demanding the whole amount covered under Ext.A1 promissory note and if Ext.A2 was genuine, it would have been definitely mentioned in Ext.A3. Learned District Judge also found that if Ext.A1 promissory note was genuine, there was no necessity to create Ext.A2 and instead an

acknowledgement would have been obtained in Ext.A1 itself and disbelieved the case of appellant. The question is whether appreciation of evidence by first appellate court is perverse warranting reappreciation of evidence in exercise of powers of this court under section 100 of C.P.C. Ordinarily finding of fact by first appellate court is final.

7. Ext.A2 is an acknowledgement allegedly executed by respondent on 29.3.1990, undertaking to repay the balance covered under Ext.A1 promissory note. Ext.A3 lawyer notice was sent on 1.10.1990. As rightly found by first appellate court, there is no whisper about execution of Ext.A2 or repayment of Rs.5000/- in Ext.A3 lawyer notice. Added to that what was demanded under Ext.A3 is not the amount covered under Ext.A1 less the payment made under Ext.A2 but the entire amount covered under Ext.A1 indicating that Ext.A2 acknowledgement was not in existence on 1.10.1990 as otherwise appellant

would have mentioned about Ext.A2 in A3 notice and demanded only the balance amount. Therefore the view taken by first appellate court that Ext.A2 is a concocted document is definitely a reasonable and possible view that could be taken on the evidence. In any event, it cannot be said to be a perverse appreciation of evidence. The question is if Ext.A2 is concocted, what is its effect on Ext.A1.

8. As rightly found by first appellate court if a portion of the amount covered under Ext.A1 was paid, ordinarily an acknowledgement will be made in Ext.A1. Instead of that Ext.A2 was concocted to make it appear that respondent had paid Rs.5000/- towards the amount due under Ext.A1. If that be so, the view taken by first appellate court that Ext.A2 was created for the purpose of strengthening Ext.A1 promissory note is also a reasonable and possible view. If that be so, in appreciating the entire evidence, the view taken by first appellate court that

respondent did not execute Ext.A1 promissory note is also a possible and reasonable view which cannot be interfered by reappreciating the evidence. Presumption provided under section 118 of Negotiable Instruments Act can be drawn only if execution of the promissory note is proved. In the nature of the evidence and facts of the case, no such presumption could be drawn. Suit was rightly dismissed by the first appellate court. There is no merit in the appeal.

Appeal is dismissed. No cost.

M.Sasidharan Nambiar
Judge

Tpl/-